IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-705

BROWNING-FERRIS INDUSTRIES, INC.,

Petitioners,

vs.

TIGER TRASH, A Division of JOE W. MORGAN, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT, TIGER TRASH, A Division of JOE W. MORGAN, INC., IN OPPOSITION

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The respondent, Tiger Trash, A Division of Joe W. Morgan, Inc. ("Tiger Trash"), respectfully opposes the petition of the petitioner, Browning-Ferris Industries, Inc. ("BFI"), to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the decision entered by that Court in Cause No. 76-2259 on August 18, 1977.

QUESTION PRESENTED FOR REVIEW

The issue presented to this Court for review concerns

the application of the antitrust venue provision of Section 12 of the Clayton Act (15 U.S.C. §22). BFI's Question Presented for Review states as an ultimate fact that BFI does not transact business in Indiana, the forum district of its subsidiary, Browning-Ferris Industries in Indiana, Inc., ("its subsidiary") and that it has no control over its subsidiary. These factual recitals are contrary to the findings of the Seventh Circuit. For purposes of illustration, the Question Presented for Review by BFI is repeated with Tiger Trash underlining those facts found contrawise by the Seventh Circuit:

> "Whether a national holding or parent corporation is subject to venue and jurisdiction under Section 12 of the Clayton Act (15 U.S.C. §22) in a district in which its wholly-owned subsidiary transacts business, *when the parent itself transacts no business there,* when the parent and its subsidiary are separate corporations, and *when the parent exercises no control over the subsidiary sufficient to make the subsidiary its agent or alter ego.*" [Pet. Br. 3]

Rather, the proper question presented for review relates to the factual findings, and that is:

Whether in fact, in the ordinary and usual sense, BFI transact business in Indiana of any substantial character or was found there.

STATEMENT OF THE CASE

Tiger Trash does not take issue with the general background of the parties' organization nor procedure of the case. However, the factual background, as it relates to BFI's transacting its subsidiary's business or its presence in the State of Indiana, is not completely and fairly stated.

First, it should be noted that BFI makes reference to a "uncontroverted affidavit" showing that BFI -- being a non-operating parent company -- does not do or solicit business in Indiana; has no property or office of any kind in Indiana;

has no employees or agents in Indiana; has never supplied services, goods or materials of any kind in Indiana; and has never manufactured or sold goods or materials which were shipped into Indiana. [Pet. Br. 3-4] The Seventh Circuit took particular note of the fact that notwithstanding the so-called "uncontroverted affidavit," later evidence found independently of discovery, by Tiger Trash, which was then admitted by BFI, established a set of facts quite opposite from the "uncontroverted affidavit." It should be noted this BFI affidavit was then never withdrawn, modified, corrected or otherwise properly explained. The Seventh Circuit, in its decision, finds the relevant facts, notwithstanding the "uncontroverted affidavit," to be as follows, as it relates to a BFI Regional Sales Manager, who was not a subsidiary employee, soliciting sales in Indiana:

> "Although only one BFI service agreement executed by Henson in Indiana was attached to plaintiff's request for admissions, paragraph 9 of defendant's response admits that he solicited other sales and service agreements for BFI Indiana. This is, of course, an indication of control relationship between parent and subsidiary." [Pet. App. 22]

BFI proceeds to set forth in its brief a number of factors where its subsidiary, through its own actions, acts independently of the parent. As this Court noted in *United States vs. Scophony Corporation of America,* 333 U.S. 795 (1948), at page 804:

> "Because all corporate action must be vicarious, that content could be determined only by an act of judgment which selects and attributes to the corporation, from the mass of activity done or purporting to be done on its behalf, those acts of individuals which are relevant for the particular statutory purposes and policies in hand."

Therefore, it is not only the negating facts supplied by BFI through their affidavits which need to be taken into account,

but it is the totality of factors, including the affirmative relationships between the parent, BFI, and its subsidiary. In this framework the Seventh Circuit found substantial relationships between the parent and subsidiary which were not denied or controverted by BFI in its affidavits: [Pet. App. 23]

> 1. BFI's corporate policy is to provide a single source of reliable waste services for companies with a number of geographically dispersed plants.
>
> 2. BFI's officers, some of whom are officers of BFI-Indiana, assist its subsidiary through national marketing programs. BFI assisted its subsidiary through signing of customers and making basic market development decisions.
>
> 3. BFI assists in supervising the subsidiary; by allocating financial resources; by providing finances; by providing system accounting methods; and by management supervision and examination.
>
> 4. BFI assists its subsidiary by setting standards for return on capital investment from the subsidiary, and if this return is insufficient to meet the BFI standards, BFI imposes corrective action.
>
> 5. BFI's Indiana subsidiary licenses and utilizes the parent's trade name without complying with Indiana statutes requiring registration of the trade name, and neither BFI nor BFI-Indiana makes a determined effort to notify the public they are separate entities.
>
> 6. Certain of the officers of BFI's Indiana subsidiary are also officers of BFI.
>
> 7. BFI and its subsidiary conduct their advertising and promotional activities in such a manner so as to give the appearance of one company operating nationwide to provide waste removal services.

REASONS NOT TO GRANT WRIT

Summary

The Question is one of fact weighing to determine whether BFI is either found or has so acted in transacting its business of such a substantial character as to bring it within the Indiana forum. To the extent that the Seventh Circuit Court of Appeals' decision is opposite other Circuits, it is only because each decision depends entirely upon its own particular facts; this set of facts as applied to the decisions cited in any other circuit would likely have a similar result to the Seventh Circuit. Also, the factual findings are sufficient to meet federal venue law as applied by this Court in *United States vs. Scophony Corporation of America*, 333. U. S. 795 (1948).

1. *Whether there is any conflict amongst the various Circuits in the application of Section 12 of the Clayton Act.* In the case cited by BFI, *Golf City, Inc. vs. Wilson Sporting Goods, Co.*, 555 F.2d 426, 438 (5th Cir. 1977), the Court notes that it must go beyond analyzing contacts seriatim; but rather the harder task remains which is, do the contacts taken together constitute the transaction of business in the district in the ordinary and usual sense. Then the Court goes on and notes:

> "This aspect of the inquiry is most responsible for the observation that 'the only rule of law which is uniformly applicable to all cases involving venue [is that] the decision depends entirely upon the particular facts involved.' " [citation omitted]

While the citation by BFI to the *San Antonio Telephone Co. vs. American Telephone & Telegraph Co.*, 499 F.2d 349 (5th Cir. 1974) is, of course, interesting and does set forth a proper standard, this standard is consistent with the Seventh Circuit's decision. In *San Antonio Telephone*, the evidence merely indicated a parent-subsidiary tie of general policy decisions, not more significant "daily business affairs" such

as BFI's relation to its subsidiary.

BFI cites a number of cases where there have been no venue decisions by various Circuit Courts. However, case by case, there were not the totality of cumulative facts as with the case of BFI. For example, in *Aro Manufacturing Co. vs. Automobile Body Research Corporation*, 352 F. 2d 400 (1st Cir. 1965), *cert. denied*, 383 U.S. 947 (1966), not only were there no such a group of facts, but the court concluded there was no valid service of process, and the First Circuit found it was unnecessary for that Court to consider the question of venue.

Neither is BFI's references to non-antitrust cases, particularly meaningful or useful. For example, BFI's particular reliance on *Cannon Mfg. Co. vs. Cudahy Packing Co.*, 267 U.S. 333 (1925) where Section 12 of the Clayton Act was not in issue. Rather, the Seventh Circuit placed great reliance on the venue standards established by this Court in *United States vs. Scophony Corporation of America*, 333 U.S. 795 (1948), which is the leading case under Section 12 of the Clayton Act. The standard established in *Scophony* for engaging in business in a district is "if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character." (333 U.S. 807) In *Scophony* this Court went out of its way to substitute ". . . practical, business conceptions for the previous hair-splitting legal technicalities encrusted upon the . . . 'carrying-on-business' sequence . . ." (333 U.S. 808) This Court notes that this enactment of Section 12 of the Clayton Act is thereby to relieve persons, who are injured through violations of the antitrust laws from the obstacles of having to resort to distant forums.

2. *Scope of Federal antitrust venue law.*

BFI places primary reliance for its argument on the scope of Federal antitrust venue law on *Cannon Mfg. Co. vs. Cudahy Packing Co.*, 267 U.S. 333 (1925), a non-antitrust case not utilizing Section 12 of the Clayton Act. BFI points out that in *United States vs. Scophony Corporation of America*, 333 U.S. 795 (1948), the *Cannon* decision was not overturned and would still remain applicable. Thereafter, their argument

centers on *Cannon*. It is true that *Cannon* and certain other of the non-antitrust decisions cited by BFI may not go as far as either *Scophony* or other Section 12 cases. However, as noted in *Scophony*, Section 12 of the Clayton Act was an expansion of the application of practical business concepts for technicalities. *Scophony* causes the Court to take a look at all the facts taken together. It goes on and establishes a test of whether, in fact, in the ordinary and usual sense, [BFI] transacts business [in Indiana] of any substantial character. (333 U.S. 807) See also *Eastman Kodak Co. vs. Southern Photo Materials Co.*, 273 U.S. 359, 372-73 (1927).

The Seventh Circuit has not adopted, as suggested by BFI, any new standard but has very carefully tracked and heavily relied on the *Scophony* and *Eastman Kodak* decision.

What the various districts have in common, including the Seventh Circuit, is the analysis raised in the *Scophony* case, which is whether the parent is holding stock in its subsidiary for investment purposes and exercising merely shareholder rights, or alternatively, whether the use of the stock is for purposes of exercising supervision over and intervention in the subsidiary's affairs. If factually there is sufficient intervention based upon a pattern of regular and continuing exploitation of the subsidiary, and the holdings go beyond mere stock ownership or investment purposes and beyond occasional acts of contracting, then venue will exist. See 333 U.S. 814. The Seventh Circuit has found this standard to be met and nothing more.

As this Court said in *Scophony*, as it would relate to the *Cannon* case: "We are unwilling to construe Section 12 in a manner to bring back the evils it abolished, for the situations not foreclosed by prior decisions, and thus to defeat its policy together with that of the antitrust laws, so as to make another amendment necessary." (333 U.S. 817)

CONCLUSION

For foregoing reasons, the Petition for a Writ of Certiorari should be dismissed.

Respectfully submitted,

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